

Montana Water Court
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FILED
04/20/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0905-R-2022
Lambert, Kathryn
6.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANTS: Antiques & Art of Amana Iowa LLC; Beyond
Yellowstone Homeowners Assn; Chevy Living Trust;
Sara Katherine Howe Revocable Trust; Bruce L. Lay;
Pamela A. Lay; Darlene Mann; Jon Mann; Donald S.
McLarty; Margarita McLarty; Mary B. Miller; Timothy
A. Miller; Keith E. Neal; Sharon Neal; Frank J. Saile;
Heidi L. Saile; Virginia R. Shane; Oliver Warden;
Carmen I. West; Robert B. West; Josif Grezlovski;
Viktoria Grezlovski; KWD Associates LC

CASE 43B-0905-R-2022
43B 194342-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Donald Strong filed a late objection to this claim. The Preliminary Decree includes the following issue remark:

THE CLAIMED VOLUME EXCEEDS THE MAXIMUM FEASIBLE VOLUME. BASED ON THE FLOW RATE AND PERIOD OF USE, THE MAXIMUM VOLUME POSSIBLE IS 512.73 ACRE-FEET PER YEAR.

The December 12, 2022 Order Consolidating Case And Setting Scheduling Conference states this claim also appeared in the Preliminary Decree with a decree exceeded issue remark which is erroneous, with a place of use/ownership overlap remark which the Court will not pursue, and these remarks will be removed. In addition, the Preliminary Decree states that the ditch name is Upland Ditch but the point of diversion legal description is for Mill Creek Flat Ditch. There has been confusion about the ditch name and point of diversion legal descriptions for Upland Ditch and Mill Creek Flat Ditch. A copy of the new marked aerial photograph prepared by the Montana Department of Natural Resources and Conservation ["DNRC"] was attached to this Order.

The volume issue remark was not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA. Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimants an opportunity to file additional information or evidence.

On December 20, 2022 Donald Strong filed a response stating he has no interest in any matters concerning Upland Ditch properties.

The January 27, 2023 Court Minutes, Order Entering Defaults, Order Dismissing Objection, Order Setting Filing Deadline, and Order Updating Caption And Mailing List includes the following:

As Antiques & Art of Amana Iowa LLC, Beyond Yellowstone Homeowners Assn, Chevy Living Trust, Sara Katherine Howe Revocable Trust, Bruce L. Lay, Pamela A. Lay, Darlene Mann, Jon Mann, Donald S. McLarty, Margarita McLarty, Frank J. Saile, Heidi L. Saile, Josif Grezlovski, Viktoria Grezlovski, KWD Associates LC, and Donald Strong did not appear as directed in the December 12, 2022 Order Consolidating Case And Setting Scheduling Conference, pursuant to Rule 55(a), M.R.Civ.P. and Rule 22, W.R.Adj.R., it is

ORDERED that the defaults of Antiques & Art of Amana Iowa LLC, Beyond

Yellowstone Homeowners Assn, Chevy Living Trust, Sara Katherine Howe Revocable Trust, Bruce L. Lay, Pamela A. Lay, Darlene Mann, Jon Mann, Donald S. McLarty, Margarita McLarty, Frank J. Saile, Heidi L. Saile, Josif Grezlovski, Viktoria Grezlovski, KWD Associates LC, and Donald Strong are entered. The Court will not take any action at this time concerning the defaults except the default of Donald Strong.

It is noted that Donald Strong filed a statement on December 23, 2022 in Case 43B-0623-R-2022 involving what used to be two other Strong Mill Creek water rights. He states he has no interest in any of the Mill Creek properties and requested removal from that Case. The claimants present at the scheduling conference for this Case were asked if any of them wished to be substituted as objector. All stated that they did not want to be substituted as objector. For this Case, pursuant to his default, and failure to appear and prosecute his objection, pursuant to Rule 55(a), M.R.Civ.P. and Rule 22, W.R.Adj.R., it is

ORDERED that the Donald Strong objection is DISMISSED.

The claimants present at the scheduling conference agreed the volume quantity should be removed from the abstract of this claim and the following standard remark should be added: THE TOTAL VOLUME OF THE RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. They also agreed the ditch name should be changed to MILL CREEK FLAT DITCH. Therefore, it is

ORDERED that the deadline is **February 27, 2023** for Antiques & Art of Amana Iowa LLC, Beyond Yellowstone Homeowners Assn, Chevy Living Trust, Sara Katherine Howe Revocable Trust, Bruce L. Lay, Pamela A. Lay, Darlene Mann, Jon Mann, Donald S. McLarty, Margarita McLarty, Frank J. Saile, Heidi L. Saile, Josif Grezlovski, Viktoria Grezlovski, and KWD Associates LC to show cause in writing why the Court should not proceed with amending this claim by removing the volume quantification, adding the standard remark as described above, and changing the ditch name. If not filed by the deadline, the Court will proceed with amending the volume and ditch name of this claim as described above.

Nothing was filed by the claimants identified in this Order. On February 3, 2023 claimants Timothy A. Miller, Mary B. Miller, Keith E. Neal, and Sharon Neal, claimants present at the scheduling conference, filed a statement confirming the ditch name is Mill Creek Flat Ditch. On February 21, 2022, Virginia R. Shane, one of the claimants present at the scheduling conference, filed a response confirming the addition of the volume remark and confirming the ditch name is Mill Creek Flat Ditch. These documents are viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

“All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section.” Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. The Preliminary Decree includes the following issue remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 200 MINER'S INCHES DECREED IN CASE NO. 11616 , PARK COUNTY. 43B 125014-00, 43B 194342-00, 43B 194390-00, 43B 194341-00, 43B 194474-00.

Each of the claims identified in the decree exceeded issue remark is based on one of two rights decreed to Fred Peake in Cause No. 11616, *Petrich et al. v. Allen et al.*, Sixth Judicial District, Park County. Each right is for 200 miner's inches with priority date June 4, 1963. The flow rates were erroneously totaled as for a single right, rather than separately totaled for two separate water rights. The total flow rate claimed for each Peake right does not exceed the decreed flow rate for each Peake right. The remark is erroneous and should not have been added to any of the claims listed in the remark. The remark should be removed with no additional proceedings.

2. The Preliminary Decree states that the volume is 731.25 AC-FT. This is a direct flow irrigation claim. The volume quantification should be removed and replaced with: THE TOTAL VOLUME OF THE RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. The volume issue remark should be removed as addressed and resolved.

3. The Preliminary Decree states that the ditch name is UPLAND DITCH. The ditch name should be MILL CREEK FLAT DITCH.

4. The Preliminary Decree also included the following notice remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT WERE FILED BY DIFFERENT PARTIES WHO CLAIM OVERLAPPING PLACES OF USE. 43B 37051-05, 43B 194192-00, 43B 194193-00, 43B

194194-00, 43B 194337-00, 43B 194338-00, 43B 194339-00, 43B 194340-00, 43B 194341-00, 43B 194342-00, 43B 194388-00, 43B 194390-00, 43B 194391-00.

DITCH NAME WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

No objection was filed to pursue the possible issue identified in the first remark. The second remark provides notice of the ditch name change made prior to issuance of the Preliminary Decree. Both remarks should be removed as having served their notice purposes.

CONCLUSION OF LAW

The Statement of Claim, the new DNRC marked aerial photograph, and the information provided by some of the claimants is sufficient to resolve the ditch name issue and to resolve the volume issue remark without evidentiary hearing. Sections 85-2-248(3), (9), and (11), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

Antiques & Art of Amana Iowa LLC
PO Box 104
Pray, MT 59065

Beyond Yellowstone Homeowners Assn
% Charles G. Duffy
PO Box 70
Pray, MT 59065

Chevy Living Trust
Daniel & Shannon Chevy Ttees
6 Sedona Ln
Livingston, MT 59047

Sara Katherine Howe Revocable Trust
73 Chicory Rd
Livingston, MT 59047-8704

Bruce L. Lay
Pamela A. Lay
57 Cutthroat Ln
Livingston, MT 59047

Darlene Mann
Jon Mann
29 O'Rea Creek Rd
Livingston, MT 59047

Donald S. McLarty
Margarita McLarty
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Livingston, MT 59047-8704

Mary B. Miller
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Pray, MT 59065-7119

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PO Box 33
Pray, MT 59065-0033

Oliver Warden
3 Cascade Ln
Livingston, MT 59047-8815

Carmen I. West
Robert B. West
636 SW Dogwood Rd
Port Orchard, WA 98367-8313

Josif Grezlovski
Viktoria Grezlovski
17945 SW 83 Ct
Palmetto Bay, FL 33157

KWD Associates LC
1153 E. Sunscape Lane
Draper, UT 84020

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: **43B 194342-00** STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners:

KWD ASSOCIATES LC

19 W 620 S

OREM, UT 84058

CARMEN I WEST

636 SW DOGWOOD RD

PORT ORCHARD, WA 98367 8313

VIRGINIA R SHANE

PO BOX 33

PRAY, MT 59065 0033

FRANK J SAILE

PO BOX 123

PRAY, MT 59065 0123

JON MANN

67 CHICORY RD

LIVINGSTON, MT 59047

DARLENE MANN

67 CHICORY RD

LIVINGSTON, MT 59047

PAMELA A LAY

57 CUTTHROAT LN

LIVINGSTON, MT 59047

BRUCE L LAY

57 CUTTHROAT LN

LIVINGSTON, MT 59047

BEYOND YELLOWSTONE HOMEOWNERS ASSN

% CHARLES G DUFFY

PO BOX 70

PRAY, MT 59065 0070

DONALD S MCLARTY

85 CHICORY RD

LIVINGSTON, MT 59047 8704

MARGARITA MCLARTY

85 CHICORY RD

LIVINGSTON, MT 59047 8704

JOSIF GREZLOVSKI

17945 SW 83 CT
PALMETTO BAY, FL 33157

Owners:

VIKTORIA GREZLOVSKI
17945 SW 83 CT
PALMETTO BAY, FL 33157

KEITH E NEAL
47 EMIGRANT MEADOWS RD
PRAY, MT 59065 7119

SHARON NEAL
47 EMIGRANT MEADOWS RD
PRAY, MT 59065 7119

HEIDI L SAILE
PO BOX 123
PRAY, MT 59065 0123

ROBERT B WEST
636 SW DOGWOOD RD
PORT ORCHARD, WA 98367 8313

TIMOTHY A MILLER
PO BOX 140
EMIGRANT, MT 59027

MARY B MILLER
PO BOX 140
EMIGRANT, MT 59027

HOWE SARA KATHERINE REVOCABLE TRUST
73 CHICORY RD
LIVINGSTON, MT 59047 8704

ANTIQUES & ART OF AMANA IOWA LLC
1585 E RIVER RD
PO BOX 104
PRAY, MT 59065

CHEVY LIVING TRUST
DANIEL & SHANNON CHEVY TTEES
6 SEDONA LN
LIVINGSTON, MT 59047

OLIVER WARDEN
3 CASCADE LN
LIVINGSTON, MT 59047 8815

Priority Date:

JUNE 4, 1963

Type of Historical Right:

DECREED

Purpose (use):

IRRIGATION

Irrigation Type:

FLOOD

***Flow Rate:**

2.81 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 185.50

Source Name: MILL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNE	3	6S	9E	PARK

Period of Diversion: APRIL 15 TO JULY 15

Diversion Means: HEADGATE

Ditch Name: MILL CREEK FLAT DITCH

Period of Use: APRIL 15 TO JULY 15

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	7.00		NWNENW	18	5S	9E	PARK
2	7.00		SWNENW	18	5S	9E	PARK
3	9.00		SENENW	18	5S	9E	PARK
4	8.00		NENENW	18	5S	9E	PARK
5	6.00		NENWNW	18	5S	9E	PARK
6	2.00		NWNWNW	18	5S	9E	PARK
7	7.50		SENWNW	18	5S	9E	PARK
8	7.50		NESWNW	18	5S	9E	PARK
9	4.50		SESWNW	18	5S	9E	PARK
10	10.00		NESENW	18	5S	9E	PARK
11	10.00		NWSENW	18	5S	9E	PARK
12	10.00		SWSENW	18	5S	9E	PARK
13	8.50		SESENW	18	5S	9E	PARK
14	7.00		NWNWNE	18	5S	9E	PARK
15	3.00		SWNWNE	18	5S	9E	PARK
16	6.50		SENWNE	18	5S	9E	PARK
17	10.00		NESWNE	18	5S	9E	PARK
18	8.00		NWSWNE	18	5S	9E	PARK
19	9.50		SWSWNE	18	5S	9E	PARK
20	10.00		SESWNE	18	5S	9E	PARK
21	9.50		NESESE	12	5S	8E	PARK
22	7.50		NWSESE	12	5S	8E	PARK
23	8.00		SWSESE	12	5S	8E	PARK
24	9.50		SESESE	12	5S	8E	PARK

Total: 185.50

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

194337-00

194339-00

194340-00

194341-00

194342-00

AUTHORIZATION TO CHANGE ISSUED 10/23/1989 FOR CHANGE IN AOINT OF DIVERSION AND PLACE OF USE,
NOTICE OF COMPLETION DUE 11/30/1991.